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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

9 TONIE M. HORLICK,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of  
Social Security,

13 Defendant.

NO. C11-1439-RSM-JPD

REPORT AND  
RECOMMENDATION

14 Plaintiff Tonie M. Horlick appeals the final decision of the Commissioner of the Social  
15 Security Administration (“Commissioner”) which denied his applications for Disability  
16 Insurance Benefits (“DIB”) and Supplemental Security Income (“SSI”) under Titles II and XVI  
17 of the Social Security Act, 42 U.S.C. §§ 401-33 and 1381-83f, after a hearing before an  
18 administrative law judge (“ALJ”). For the reasons set forth below, the Court recommends that  
19 the Commissioner’s decision be reversed and remanded.

20 I. FACTS AND PROCEDURAL HISTORY

21 At the time of her administrative hearing, plaintiff was a 41 year-old woman with a  
22 GED and one year of technical college education. Administrative Record (“AR”) at 40. Her  
23 past work experience includes employment as a receptionist in a doctor’s office. AR at 26.  
24 Plaintiff was last gainfully employed in 2006. AR at 40.

1 On May 30, 2008, plaintiff filed a claim for SSI payments and an application for DIB,  
2 alleging an onset date of February 28, 2006. AR at 16. Plaintiff asserts that she is disabled due  
3 to fibromyalgia, obesity, affective disorder, and anxiety disorder. AR at 18.

4 The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 16.  
5 Plaintiff requested a hearing which took place on March 1, 2010. AR at 34-73. On May 14,  
6 2010, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on his  
7 finding that plaintiff could perform a specific job existing in significant numbers in the national  
8 economy. AR at 16-28. Plaintiff's administrative appeal of the ALJ's decision was denied by  
9 the Appeals Council, AR at 1-3, making the ALJ's ruling the "final decision" of the  
10 Commissioner as that term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present  
11 action challenging the Commissioner's decision. Dkt. No. 3.

## 12 II. JURISDICTION

13 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§  
14 405(g) and 1383(c)(3).

## 15 III. STANDARD OF REVIEW

16 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of  
17 social security benefits when the ALJ's findings are based on legal error or not supported by  
18 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th  
19 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is  
20 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.  
21 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750  
22 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in  
23 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,  
24 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a

1 whole, it may neither reweigh the evidence nor substitute its judgment for that of the  
2 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is  
3 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that  
4 must be upheld. *Id.*

5 The Court may direct an award of benefits where "the record has been fully developed  
6 and further administrative proceedings would serve no useful purpose." *McCartey v.*  
7 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292  
8 (9th Cir. 1996)). The Court may find that this occurs when:

9 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the  
10 claimant's evidence; (2) there are no outstanding issues that must be resolved  
11 before a determination of disability can be made; and (3) it is clear from the  
record that the ALJ would be required to find the claimant disabled if he  
considered the claimant's evidence.

12 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that  
13 erroneously rejected evidence may be credited when all three elements are met).

#### 14 IV. EVALUATING DISABILITY

15 As the claimant, Ms. Horlick bears the burden of proving that she is disabled within the  
16 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th  
17 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in  
18 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is  
19 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§  
20 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments  
21 are of such severity that she is unable to do her previous work, and cannot, considering her age,  
22 education, and work experience, engage in any other substantial gainful activity existing in the  
23 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-  
24 99 (9th Cir. 1999).

1           The Commissioner has established a five step sequential evaluation process for  
2 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§  
3 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At  
4 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at  
5 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step  
6 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.  
7 §§ 404.1520(b), 416.920(b).<sup>1</sup> If she is, disability benefits are denied. If she is not, the  
8 Commissioner proceeds to step two. At step two, the claimant must establish that she has one  
9 or more medically severe impairments, or combination of impairments, that limit her physical  
10 or mental ability to do basic work activities. If the claimant does not have such impairments,  
11 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe  
12 impairment, the Commissioner moves to step three to determine whether the impairment meets  
13 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),  
14 416.920(d). A claimant whose impairment meets or equals one of the listings for the required  
15 twelve-month duration requirement is disabled. *Id.*

16           When the claimant’s impairment neither meets nor equals one of the impairments listed  
17 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s  
18 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the  
19 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work  
20 to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If  
21 the claimant is able to perform her past relevant work, she is not disabled; if the opposite is

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23           <sup>1</sup> Substantial gainful activity is work activity that is both substantial, i.e., involves  
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §  
404.1572.

1 true, then the burden shifts to the Commissioner at step five to show that the claimant can  
2 perform other work that exists in significant numbers in the national economy, taking into  
3 consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§  
4 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the  
5 claimant is unable to perform other work, then the claimant is found disabled and benefits may  
6 be awarded.

## 7 V. DECISION BELOW

8 On May 14, 2010, the ALJ issued a decision finding the following:

- 9 1. The claimant last met the insured status requirements of the Social  
10 Security Act on March 31, 2009.
- 11 2. The claimant did not engage in substantial gainful activity during the  
12 period from her alleged onset date of February 28, 2006 through her  
13 date last insured of March 31, 2009.
- 14 3. Through the date last insured, the claimant had the following severe  
15 impairments: fibromyalgia, obesity, affective disorder, and anxiety  
16 disorder.
- 17 4. Through the date last insured, the claimant did not have an impairment  
18 or combination of impairments that met or medically equaled one of  
19 the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
- 20 5. After careful consideration of the entire record, the undersigned finds  
21 that, through the date last insured, the claimant had the residual  
22 functional capacity to perform medium work as defined in 20 CFR  
23 404.1567(c). She could lift and/or carry 50 pounds occasionally and  
24 25 pounds frequently. She could stand and/or walk with normal breaks  
for a total of about six hours in an eight hour workday. She could sit  
with normal breaks for a total of about six hours in an eight hour  
workday. She could push and/or pull (including operation of hand  
and/or foot controls) unlimited other than as shown for lift and carry.  
The claimant could occasionally climb, balance, stoop, crouch and  
crawl. There were no visual or communication limitations. The  
claimant was required to avoid concentrated exposure to extremes of  
cold, wetness, and humidity; i.e., outdoor work. She was precluded  
from working around hazardous machinery and from working at  
heights. The claimant had the mental capacity to adequately perform  
the mental activities generally required by competitive, remunerative  
work as follows: understand, remember and carry out simple 2 to 3

1 step instructions required of unskilled work. She had average ability  
2 to perform sustained work activities (i.e. can maintain attention and  
3 concentration; persistence and pace) in an ordinary work setting on a  
4 regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or  
5 an equivalent work schedule) within customary tolerances of  
6 employers rules regarding sick leave and absence. She could make  
7 judgments on simple work-related decisions required of unskilled  
8 work; could respond appropriately to supervision, co-workers and;  
9 and could deal with changes all within a stable work environment.  
10 The claimant could not deal with the general public as in a sales  
11 position or where the general public was frequently encountered as an  
12 essential element of the work process. Incidental contact with the  
13 general public was not precluded.

- 14 6. Through the date last insured, the claimant was unable to perform any  
15 past relevant work.
- 16 7. The claimant was born on XXXXX, 1968 and was 40 years old, which  
17 is defined as a younger individual age 18-49, on the date last insured.<sup>2</sup>
- 18 8. The claimant has at least a high school education and is able to  
19 communicate in English.
- 20 9. Transferability of job skills is not material to the determination of  
21 disability because using the Medical-Vocational Rules as a framework  
22 supports a finding that the claimant is “not disabled,” whether or not  
23 the claimant has transferable job skills.
- 24 10. Through the date last insured, considering the claimant’s age,  
education, work experience, and residual functional capacity, there  
were jobs that existed in significant numbers in the national economy  
that the claimant could have performed.
11. The claimant was not under a disability, as defined in the Social  
Security Act, at any time from February 28, 2006, the alleged onset  
date, through March 31, 2009, the date last insured.

AR at 18-27.

## VI. ISSUES ON APPEAL

The principal issues on appeal are:

1. Did the ALJ properly evaluate lay-witness statements from plaintiff’s mother?

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<sup>2</sup> The actual date is deleted in accordance with Local Rule CR 5.2, W.D. Washington.

2. Did the ALJ properly evaluate the September 2008 Physical Residual Functional Capacity Assessment written by Lou Slak?
3. Did the ALJ err in his evaluation of the opinions of non-examining State agency psychologists Mary Gentile, Ph.D. and Renee Eisenhauer, Ph.D.?
4. Did the ALJ err in his assessment of plaintiff's credibility?

Dkt. No. 16 at 1-2.

## VII. DISCUSSION

### A. The ALJ Erred in His Evaluation of Lay Witness Statements

In February 2007, plaintiff's mother submitted a written statement outlining her observations of the impacts of plaintiff's impairment on her ability to work. AR at 163-71. In addition, she testified at the administrative hearing that the plaintiff lives in her home, that she sees her daily, and about plaintiff's abilities. AR at 58-62. In his opinion, the ALJ noted that the lay witness testimony supported plaintiff's allegations, so clearly the testimony was material. However, the ALJ also concluded:

The undersigned notes that there is obvious familial bias, and Ms. Briggs has a monetary interest in the outcome of the claim. Accordingly, *the undersigned does not consider* Ms. Briggs' statements in his determination of the claimant's residual functional capacity.

AR at 26 (emphasis added).

In order to determine whether a claimant is disabled, an ALJ may consider lay-witness sources, such as testimony by nurse practitioners, physicians' assistants, and counselors, as well as "non-medical" sources, such as spouses, parents, siblings, and friends. *See* 20 C.F.R. § 404.1513(d). Such testimony regarding a claimant's symptoms or how an impairment affects his ability to work is competent evidence, and cannot be disregarded without comment. *Dodrill v. Shalala*, 12 F.3d 915, 918-19 (9th Cir. 1993). If an ALJ chooses to discount testimony of a lay witness, he must provide "reasons that are germane to each witness," and may not simply categorically discredit the testimony. *Dodrill*, 12 F.3d at 919. Moreover, the "fact that a lay

1 witness is a family member cannot be a ground for rejecting his or her testimony.” *Smolen v.*  
2 *Chater*, 80 F.3d 1273, 1289 (9th Cir. 1996).

3 The ALJ erred by his categorical denial to consider the statements of the family. On  
4 remand, the ALJ should reevaluate plaintiff’s credibility and RFC, taking into account the lay-  
5 witness testimony.

6 B. On Remand, the ALJ Should Reevaluate the State Disability Determination  
7 Services Report

8 In his opinion, the ALJ cited to a September 2, 2008 State Agency reviewing medical  
9 consultant, who opined that plaintiff could perform medium work with additional postural and  
10 environmental limitations. AR at 25, Plaintiff’s claim was assigned to Lou Slak, a single  
11 decision maker (“SDM”). AR at 350-57. Mr. Slak is not a trained physician, yet the ALJ held:

12 In determining the claimant’s physical residual functional capacity, the  
13 undersigned considered a September 2, 2008 [report] from the State agency’s  
14 reviewing medical consultant, who opined that the claimant could perform  
15 medium work with additional postural and environmental limitations. Exhibit  
16 21F. Although the State agency’s consultant did not examine the claimant, the  
17 State agency’s consultant is considered an[] expert in the Social Security  
18 Disability programs and the State agency’s consultant’s opinions are well  
19 supported by the medical evidence. It should also be noted that *the State*  
20 *agency’s consultant has reviewed the medical evidence objectively, and would*  
21 *be unlikely to be sympathetic or prejudiced toward the interests of the claimant.*  
22 For all of these reasons, substantial weight has been given to the determinations  
23 of the State agency’s consultant and the undersigned adopts those findings in  
24 determining the claimant’s physical residual functional capacity. SSR 96-6p.

AR at 25 (emphasis added).

19 On September 14, 2010, after the administrative hearing that took place in this case, it  
20 appears that the Office of the Chief Administrative Law Judge directed ALJs to refrain from  
21 evaluating or relying upon SDM determinations as substantive evidence. *See, Consideration of*  
22 *Single Decisionmaker (SDM) Residual Functional Capacity Assessment and Other Findings.*  
23 This, by itself, may or may not be error, particularly since the memo came out after the  
24



1 administrative hearing in this case. The Eighth Circuit concluded that reliance on the non-  
2 physician SDM opinion was error in *Dewey v. Astrue*, 509 F.3d 447, 448-50 (8th Cir. 2007).  
3 The Commissioner argues it is inapposite to the facts of this case. Plaintiff disagrees. Because  
4 this matter must be remanded for the other reasons cited, it is not necessary to decide whether  
5 this issue itself would warrant remand. However, the Court is concerned by the language  
6 highlighted above. The language implicitly assumes that physicians who actually examined  
7 and treated the plaintiff would have a bias either for or against the plaintiff, which is why the  
8 ALJ gave extra weight to the non-examining, non-physician report of the SDM. This implicit  
9 assumption introduces two fundamental errors. First, there is no basis to suggest (implicitly or  
10 explicitly) that any of the examining or non-examining physicians demonstrated any bias in  
11 favor or against the plaintiff. *Compare, e.g., Nguyen v. Chater*, 100 F.3d 1462, 64-5 (9th Cir.  
12 1996). Second, taken to its logical extreme, the ALJ's reasoning would mean that a non-  
13 examining non-physician report was entitled to more weight than the report of an examining  
14 physician, contrary to well-established Ninth Circuit law. *See Orn v. Astrue*, 495 F.3d 625,  
15 631 (9th Cir. 2007).

16 On remand, the ALJ should reevaluate the plaintiff's RFC in accordance with the  
17 hierarchy of medical evidence established in *Orn*. If the ALJ decides to re-credit the opinion  
18 of Mr. Slak, he should also address in his opinion the significance, if any, that he attaches to  
19 the direction of the Chief Administrative Law Judge directive regarding SDMs.

20 C. The ALJ Did Not Err in His Evaluation of Dr. Gentile's Opinion

21 Plaintiff's third assignment of error involves the ALJ's evaluation of the opinion of  
22 Mary Gentile, Ph.D. Dr. Gentile is a non-examining State agency psychologist who prepared a  
23 Mental Residual Functional Capacity Assessment in September 2008. AR at 358-61. Dr.  
24 Gentile opined that plaintiff was not significantly limited in 17 categories, that she had

1 moderate limitations in 3 areas, namely the ability to maintain attention and concentration for  
2 extended periods, the ability to perform activities within a schedule, maintain regular  
3 attendance and be punctual within customary tolerances, and the ability to act appropriately  
4 with the general public. AR at 358-59. She further opined that plaintiff was “cognitively  
5 intact and capable of simple and complex tasks. Her attn, concentration and attendance would  
6 episodically wane due to subjective experience of pain and her psych sxs. Clt would do best  
7 away from the ongoing demands of the general public and crowed areas. No adaptive  
8 limitations noted.” AR at 360.

9 The ALJ found that with respect to plaintiff’s mental impairments RFC, plaintiff  
10 had the mental capacity to adequately perform the mental activities generally  
11 required by competitive, remunerative work as follows: understand, remember  
12 and carry out simple 2 to 3 step instructions required of unskilled work. She  
13 had average ability to perform sustained work activities (i.e., can maintain  
14 attention and concentration, p; persistence and pace) in an ordinary work setting  
15 on a regular and continuing basis (i.e., 8 hours a day, for 5 days a week, or an  
16 equivalent work schedule) within customary tolerances of employers rules  
17 regarding sick leave and absence. She could make judgments on simple work-  
18 related decisions required of unskilled work; could respond appropriately to  
19 supervision, co-workers and; and could deal with changes all within a stable  
20 work environment. The claimant could not deal with the general public as in a  
21 sales position or where the general public was frequently encountered as an  
22 essential element of the work process. Incidental contact with the general  
23 public was not precluded.

24 AR at 22.

Plaintiff argues that the ALJ failed to take into account the moderate limitations noted  
by Dr. Gentile. Dkt. No. 15 at 14-15, particularly because the Vocational Expert called to  
testify assumed “adequate concentration” in her testimony (AR at 67) and because Dr.  
Gentile’s statement that plaintiff would “do best away from ongoing demands of the general  
public and crowded areas” did not translate to not having any but incidental contact with the  
public.

1           The ALJ did not err. First, as to the moderate limitations of concentration, persistence  
2 and pace, the ALJ took this into account in his RFC assessment, by limiting plaintiff to  
3 unskilled work involving 2 to 3 step instructions, involving simple work-related decisions. Dr.  
4 Gentile also noted that plaintiff's cognitive abilities for complex and simple tasks remained  
5 intact. As to plaintiff's argument that the ALJ ignored Dr. Gentile's opinion that plaintiff  
6 "would do best" away from crowded areas, an ALJ does not err by excluding this type of  
7 recommendation from the RFC. *See, Valentine v. Commr. of Soc. Sec. Admin.*, 574 F.3d 685  
8 (9th Cir. 2009). The ALJ took this opinion into account by restricting the plaintiff from other  
9 than incidental contact with the public. The ALJ properly evaluated Dr. Gentile's opinion  
10 when assessing plaintiff's RFC. While resolution of the remaining issues in this case may  
11 necessitate a further review of plaintiff's RFC, the ALJ's evaluation of Dr. Gentile's opinion is  
12 not one of them.

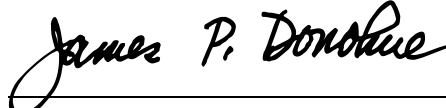
13           D.     On Remand, the ALJ Should Reevaluate Plaintiff's Credibility

14           Plaintiff is obese. AR at 18. One of the facts cited by the ALJ to support an adverse  
15 credibility finding was that plaintiff failed to follow doctor's advice to lose weight. AR at 24.  
16 In *Orn*, 495 F.3d at 638, the court held that "failure to follow treatment for obesity tells us little  
17 or nothing about a claimant's credibility." The Commissioner argues that there are a  
18 substantial number of other reasons given for the adverse credibility finding in the record that  
19 constitute substantial evidence to support the finding. Because this matter is being remanded  
20 for other reasons, the ALJ should revisit plaintiff's credibility, and should not rely upon the  
21 failure to lose weight in reaching the decision.

VIII. CONCLUSION

For the foregoing reasons, the Court recommends that this case be REVERSED and REMANDED to the Commissioner for further proceedings not inconsistent with the Court's instructions. A proposed order accompanies this Report and Recommendation.

DATED this 2nd day of April, 2012.

  
JAMES P. DONOHUE  
United States Magistrate Judge